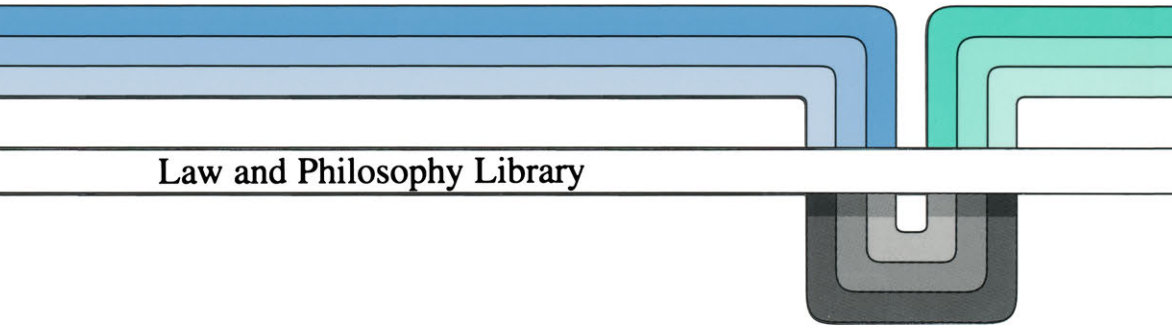

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Legal Indeterminacy and Constitutional Interpretation

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IV. The Primacy of the Constitution

1. The Constitution as Precommitment

In Chapter III, I have suggested that the originating legal system of a given legal order may consist in the norms of a constitution. Now, since the proposed definition of 'legal order' actually was a definition pattern identifying a sequence of normative systems, beginning with some first system, no further arguments for justifying the special primacy of that originating system were given. Primacy resulted, so to speak, from the model's defining characteristics.

When we look at actually existing legal orders, however, it is legitimate to question the legitimacy of that primacy. The explication of primacy I will refer to is subject to some constraints; e. g., it only refers to an explication for legal orders arising in the context of a representative democracy. This constraint is due to the fact that my interest in the present investigation is constitutional interpretation in the context of representative democracy, as is the case, e. g., of the Spanish Constitution of 1978. I do not exclude that similar strategies of explication can be found, *mutatis mutandis*, for constitutions existing in non-democratic political regimes. But that possibility will not be analyzed here.

In fact, representative democracy, understood as a method of decision making by majority vote, contradicts the idea of the primacy of the constitution, understood as a constraint on the set of decisions a majority may take. This has been called the *paradox of democracy* (Elster 1979, 94; also Holmes 1988, 222) according to which 'Each generation wants to be free to bind its successors, while not being bound by its predecessors'.

Jon Elster has spelled out an analogy between certain mechanisms of what he calls *imperfect rationality* — of an individual kind — and the case of the paradox of democracy. His example is that of Ulysses and the Sirens. As everybody knows, Ulysses knows that his will is too weak for him to behave rationally should he hear the Sirens sing, and since he wants to satisfy his desire to hear them sing, he devises a strategy: he has his sailors tie him to the mast and makes them plug their ears with wax. Elster then continues (1979, 36):

„Ulysses was not fully rational, for a rational creature would not have to resort to this device; nor was he simply the passive and irrational vehicle for his changing wants and desires, for he was capable of achieving by indirect means the same end as a rational person could have realised in a direct manner. His predicament — being weak and knowing it — points to the need for a theory of *imperfect rationality* that has been all but negelected by philosophers and social scientists."

Ulysses's mechanism is a mechanism of precommitment, of *binding oneself* and „To bind oneself is to carry out a certain decision at time t_1 in order to increase the probability that one will carry out another decision at time t_2" (Elster 1979, 39).

Precommitment mechanisms are used by human beings in many situations of *akrasia*, for instance, in strategies to quit smoking (e. g., spending some time at a place where there are no cigarettes to be had), to lose weight (e. g., not having in the house, or

at the place where one spends most of one's time, the food one craves), etc. To bind oneself in that kind of situations is to exclude certain future decisions, in order to uphold a past decision that is valued positively.

The analogy with mechanisms of collective decision consists in the suggestion that precommitment, i. e., eliminating the possibility of taking certain decisions in the future in order to preserve especially valuable contents, is applicable to collective decisions too.[1]

We can thus understand the distinction common in political theory, between *constituent* power and *constituted* power. To say it once again with Elster's words:

„A crucial notion in this connection is the function of the *constituent assembly* that lays down the ground rules to be followed by all later generations. Only the constituent assembly really is a political actor, in the strong sense of *la politique politisante*; all later generations are restricted to *la politique politisée*, or the day-to-day enactment of the ground rules. The nation can bind 'itself' (a controversial notion) through the constituent assembly, by entrusting certain powers of decision to the judiciary branch, by requiring that the ground rules can only be changed by a two-thirds or a three-fourths majority, and so on." (Elster 1979, 93)

The idea of precommitment is adequately expressed in the ideal of constitutional democracy. Certain things (fundamental rights, the territorial structure of the state, the division of powers, etc.) are beyond the reach of the ordinary political agenda and, therefore, of public and legislative debate, i. e., of majority rule, which applies only to the political agenda of other matters.[2]

Note that this protection works properly with rigid constitutions, whereas flexible constitutions only have a procedural kind of precommitment mechanism (cf. Guastini 1991, 14-17).

The mechanism of precommitment is not a *conceptual* explication of the primacy of the originating system; but it is what we can call a *contextual* explication of that primacy. It is one of the *circumstances* under which one can speak of the primacy of the constitution, just as, for instance, moderate scarcity is one of what can be called the circumstances of justice (Hume 1740, III.II.ii; Rawls 1971, 126 f.). These circumstances are not part of a conceptual explication of the notion of justice, but they are part of the context in which such an explication can be given.

In the present investigation, which is basically a conceptual analysis, I will say little more about this point. But its importance is worth emphasizing, since it not only determines the context in which one can analyze the primacy of the constitution, but also is a circumstance of constitutional interpretation.

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[1] Elster (1979, 88 f.) mentions various examples from the institutions of classical Athens.

[2] Apparently, this is a widely accepted idea in contemporary political theory. Cf. the interesting presentations of it, e. g., in Nino (1992, 70 f.); Rawls (1993, 151 ff.); Ackerman (1984, 1988, 1989). Caracciolo (1991) has used a similar idea, applied to individual rights, to account for the so-called *liberal paradox*. Referring to the question of the conflict between the protection of rights and democracy, as a beautiful — although, in view of the subsequent historical development, unfortunate — historical example of precommitment, Garzón Valdés (1994, 128) reminds us of the oath foreseen in the Constitution of Cádiz: 'And if with respect to what I have sworn, or part of it, I should do the contrary, I shall not be obeyed; instead, that in which it is contradictory shall be null and void'.

2. Possible Constitutional Worlds

The originating system of a legal order determines the set of sequences of constitutionally adequate possible legal systems. Not only must all norms be created or eliminated in accordance with the norms of the first system or with other norms created in accordance with that first system; moreover, no norm contradicting a norm of the constitution, i. e., a norm of the originating system or a norm of the constitution that has been reformed in one of the subsequent systems, can be validly created. In that sense, it should be noted that the term 'constitution' is ambiguous: it may refer only to the original constitution — the originating system — or to the on-going constitution, i. e., the constitution that is in force at any given point in time. For simplicity's sake, in this presentation I will assume that the constitution is never reformed and that, therefore, 'constitution' always means the original one, i. e., the originating system of the legal order.[3]

Another way of presenting the same idea is the following: a special kind of legal propositions are those expressed in statements like the following:

(1) Constitutionally, x ought to (may not, may) do ϕ.

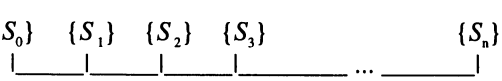
The truth of (1) determines the truth of

(2) Legally, x ought to (may not, may) do ϕ.

And the falsity of (1) determines the falsity of (2). Now, what happens if (1) lacks a truth-value? Then we know nothing about the truth-value of (2). (1) can lack a truth-value, as we know, because the constitution is silent, or because it speaks in many voices, or because it speaks in an uncertain voice. In all three cases, one would need to discover what other, inferior rules say, in order to assess the truth-value of legal propositions that may themselves be true, false, or lack a truth-value. It is in that sense that we can understand the idea that the law has a *hierarchy*. The content of the norms of each system determines the possible content of the norms of the next system.

Thus, constitutional norms constitute what Kelsen (1960, 346-356) has called a *framework* within which there may be several possibilities. Starting from the originating system, one can generate various constitutionally adequate sequences of legal systems. The constitution does not determine one single linear sequence of legal systems:

Diagram 1



[3] This also serves to avoid the question of whether or not the clauses of constitutional reform may themselves be reformed, following the procedure stipulated in them. I have treated this question in Moreso (1991). Cf. Schmitt 1928; Ross 1958, 1969; Hart 1983b; Raz 1972b; Hoerster 1972; Guastini 1982; Guibourg 1983; Bulygin 1984; Nino 1985; Suber 1990; Alarcón Cabrera 1995.

but rather a tree-shaped sequence that can be represented as follows:

Diagram 2

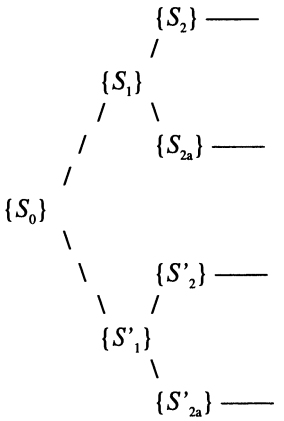


Diagram 2 should be read as saying that starting with any system not only two, but many (possibly, an infinite number of) systems can be generated. It should also be clear that not any system whatsoever can belong to a sequence. The originating system constrains the scope of systems that can be generated, but every choice (every act of normative creation or elimination) constrains even more the set of sequences that can be generated.

Diagram 2 represents the set of *possible* legal orders starting with a given originating system. However, if we take a present or past time t as our point of reference, then we can reconstruct the sequence of systems from the initial time t_0 — corresponding to system S_0 — up to t as a linear sequence.[4] Thus, Diagram 1 represents what can be called the *real legal order*, whereas Diagram 2 represents only *possible legal orders.*

Adopting an idea from philosophical scholarship on possible worlds,[5] we can distinguish the *real* or *actual* legal world from *possible* legal worlds, and, moreover, define a relation between worlds, the relation of *accessibility*, according to which, following Diagram 2, $\{S_2\}$ is accessible from $\{S_1\}$, but not from $\{S'_1\}$.

Actually, the idea is somewhat more complicated. Systems are not worlds, but rather sets of norms closed under the relation of logical consequence. The worlds cor-

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[4] But even then, there is one reservation. Sometimes the result of an act of derogation does not determine the set of norms in which the elimination occurs and, therefore, it does not determine the resulting set of norms either. In that case too, one cannot reconstruct the legal order as a linear sequence of legal systems. We then have what is called the *logical indeterminacy of legal systems* (cf. Alchourrón/Bulygin 1979, 1981). But I will not go into this question here.

[5] In view of the general approach taken in the present investigation, that analogy should not force us to accept a realist ontology of possible worlds, as Lewis claims (1973, 88); one can think of an anti-realist approach to possible worlds, a way of speaking about how we could see the world if it were different from what it is now (cf. Kripke 1980).

responding to each system are those possible worlds that make the system effective. Here, we have nothing like the *actual* world, since that would not be likely to be a legal world (it would have to be a world that makes all the norms of a given system effective). Now, the (possible) world serving as the point of reference is the world that makes the originating system of a given order effective. The relation of accessibility is constructed starting from that system. I will call worlds that can be generated from the constitution, i. e., from the originating system, *constitutionally possible worlds.*

The most obvious case of a *constitutionally impossible world* is one corresponding to a system that contains a norm which contradicts some constitutional norm.[6] Thus, if the constitution contains a norm prohibiting the application of the death penalty as a penal sanction (like art. 15 of the Spanish Constitution),[7] then any system that contains a norm prescribing or permitting the application of the death penalty corresponds to a constitutionally impossible world, i. e., that norm does not belong to any system of the sequence originating in that constitution.

That does not only exclude systems containing norms that are inconsistent with certain constitutional norms. It also excludes systems containing norms with a certain constellation of generic cases — it excludes certain combinations of properties. The next section will be dedicated to the explanation of that idea.

3. The Thesis of Constitutional Accessibility

I will begin with a case: the Spanish Constitutional Court, in STC 222/1992, was given opportunity to rule on the constitutionality of art. 58.1 of the Spanish Landlord and Tenant Act *(Ley de Arrendamientos Urbanos)* valid at the time (Decree 4104/1964, of December 24). The article in question stipulated the right to subrogation in a lease of the lessee's surviving spouse 'with whom [the deceased tenant] had habitually cohabited in the rented property'. However, this right was denied to the surviving partner of a *de facto* couple. The question was raised whether that regulation, by treating surviving spouses differently from surviving *de facto* partners, violated the principle of equality. The Court's answer was affirmative, and it therefore proceeded to declare the rule under scrutiny unconstitutional insofar as it denied the benefit of subrogation in a lease to persons having cohabited in a stable, quasi-marital relationship with a deceased lessee.[8]

It should be noted that the Spanish Constitution does not seem to require that parliament concede the right of subrogation in such cases.[9] That means that a legal

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[6] The notion of normative contradiction introduced in Chapter I will do.

[7] With the exception of what martial law stipulates for times of war.

[8] Cf. on this topic the instructive work of Ferreres 1994. Here, I will not discuss the ruling of the Constitutional Court (STC 184/1990, 20/1991, 30/1991, 31/1991, 35/1991, 38/1991, 77/1991 and 29/1992) according to which the decision of parliament to concede a widower's pension to the surviving spouse of a deceased person and to deny it to a surviving *de facto* partner is constitutional.

[9] One could argue that this is required by the right to a decent home (art. 47), but undoubtedly such a right could be guaranteed in an indirect way. Parliament could decide that it is a desirable political objective not

world in which there is no right of subrogation is constitutionally possible. What does not seem possible, according to the court's ruling, is a legal world in which there are different normative consequences for the two generic cases. Thus, what is excluded is a certain combination of *relevant* properties of the case.

Alchourrón and Bulygin (1971, ch. VI) analyze several characteristics of universes of cases which will be useful for our purpose.

In the universe of discourse *(UD)* constituted by those cases in which the lessee of a home dies, and in relation to the universe of action *(UA)* constituted by the single act of subrogation in the lease upon the death of the lessee, only two properties are considered *relevant*[10] by article 58.1 of the Spanish Landlord and Tenant Act (i. e., the corresponding universe of properties — *UP* — has only two elements): marriage *(M)*, and cohabitation *more uxorio (C)*. Starting from this universe of relevant properties, a relevant universe of cases *(UC)* is generated.[11] These (generic) cases must be characterized in such a way that certain individual cases can be instances of them. Therefore, the combinations of properties defining some generic case may be neither tautological nor contradictory. For this, the chosen properties (*M* and *C*, in our example) must fulfill certain conditions:

a) The elements of the universe of properties must be logically independent. Two properties are logically independent if, and only if, the presence of one of them in an individual case is compatible with the presence as well as with the absence of the other one in the same individual case.

In our example, both properties satisfy the requirement. Sempronia (the deceased lessee) may have been married to Ticius and may have lived with him *more uxorio*; she may have been married to him, and not have lived with him *more uxorio*; she may not have been married to him and have lived with him *more uxorio*; and finally, she may not have been married to him and not have lived with him *more uxorio*.

b) The elements of the universe of properties must be logically independent from the behaviours in the universe of actions.

In the case of our example, marriage and cohabitation are clearly independent from the faculty of subrogation in a lease.

c) Finally, the universe of properties and the universe of discourse must be corresponding universes: each one of the elements (individual cases) of the universe of discourse must be able to have each one of the properties of the universe of properties.

It is easily seen that this prerequisite too is fulfilled by the properties of our example.

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to constrain the rental market too much, and it could also take other measures which guarantee that everyone has access to a decent home (through subsidies in certain cases, or in other ways).

[10] A property is *relevant* for a given case *C* of a universe of cases *UC* in relation to a given normative system *S* and a given universe of actions *UA* if, and only if, case *C* and its complementary case relative to *P* (i. e., the case in which, all other properties being equal, property *P* is absent) in *UC* have a different normative status in relation to *S* and *UA*. Cf. Alchourrón/Bulygin 1971, 101 f.

[11] This is not the only way of generating a universe of cases (cf. Alchourrón/Bulygin 1971, 26 f.); but it will be used here because it is the most common one.

Now, we can define the notion of an *elementary case* as a case characterized by the conjunction of all the properties of *UP* or their negations. We can then construct a universe of elementary cases from those properties in such a way that it is a *partition* (or *division*), i. e., that it satisfies the following three conditions: *i)* that none of the properties defines an empty class; *ii)* that the classes defined by the properties are logically exclusive (that no individual case is an instance of more than one generic case); and *iii)* that the combinations of properties are logically disjunctive (that every individual case belongs to some generic case).

The *UP* of our example is $\{M, C\}$, and the universe of elementary cases is created as follows: if n is the number of properties ($n = 2$, in our example), 2^n is the number of elementary cases (in our case, $2^2 = 4$). The following are the four cases of our example:

Table 1

	M	*C*
1) $M \wedge C$	+	+
2) $M \wedge \neg C$	+	-
3) $\neg M \wedge C$	-	+
4) $\neg M \wedge \neg C$	-	-

In accordance with the Landlord and Tenant Act mentioned above, case 1) was correlated with the following normative solution: subrogation in the lease is facultative *(Fs)*; cases 2), 3), and 4) were correlated with the solution that prohibited subrogation in the lease *(Phs)*. That means:

Table 2

	M	*C*	
1) $M \wedge C$	+	+	*Fs*
2) $M \wedge \neg C$	+	-	*Phs*
3) $\neg M \wedge C$	-	+	*Phs*
4) $\neg M \wedge \neg C$	-	-	*Phs*

However, this is not the only universe of cases that can be constructed with the two properties I have used here. Any number of properties and their negations can give rise to a division. Thus, we get different universes of cases, depending on the properties taken into account. In our case, we could take into account only one of the properties and its negation, or both. We, thus, get three possible universes of cases. First, the universe of cases generated from property *M* and its negation: *UC(M)*. Second, the universe of cases generated from property *C* and its negation *UC(C)*. And finally, the universe of cases generated from both properties and their negations: *UC(M, C)*.

Following Alchourrón and Bulygin (1971, 96), I will call the finite number *n* of properties of a given *UP* the *width* of that universe of properties. Since every universe of cases is a function of a *UP*, *n* not only measures the width of the *UP*, but also the *level* of the corresponding *UC*. Following our example, it is interesting to note the relationships between one of the *UC*s of level 1, *UC(C)*, and one of the *UC*s of level 2, *UC(M, C)*. We can show this with the following diagram:

Diagram 3

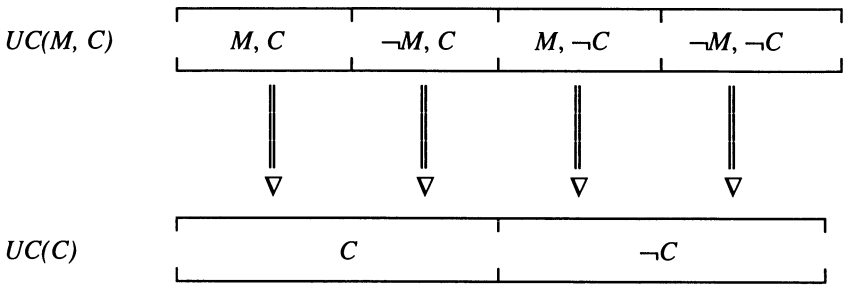

Diagram 3 shows the relationships of logical implications between the cases of the universes of cases *UC(M, C)* and *UC(C)*. *UC(M, C)*, we can say, is a *finer* universe of cases than *UC(C)*. Generally,

„A division D_1 is said to be finer than another division D_2 if and only if every element of D_1 logically implies some element of D_2 and at least one element of D_1 is not implied by any element of D_2." (Alchourrón/Bulygin 1971, 97)

The relation of *being finer* follows the direction of the arrow, in the sense that the *UC* the arrow points away from corresponds to a finer *UP* than the *UC* the arrow points to. Alchourrón and Bulygin (1971, 98-101) also habe shown certain logical relationships between universes of cases, depending on the *fineness* of the corresponding *UP*s. Thus, if a given normative system α is complete in relation to some UC_i, then it is also complete in relation to all the *UC*s that are finer than UC_i. In contrast, that a normative system α is complete in relation to a UC_i does not imply that it is also complete in relation to *UC*s that are less fine than UC_i.

On the other hand, if a normative system α is consistent in a UC_i, then it is also consistent in *UC*s less fine than UC_i. And if a normative system is inconsistent in a UC_i, then it is also inconsistent in *UC*s finer than UC_i.

Thus, while completeness is inherited upwards, from less fine to finer universes of cases, consistency is inherited downwards, from finer to less fine universes of cases.

Returning to our example, in the universe of cases *UC(M, C)*, which is the one taken into account by the Landlord and Tenant Act, the relevant properties are properties *M* and *C*. In relation to *M* as well as in relation to *C*, there are cases in which those

properties are relevant: those cases and their complementary cases have different normative status.

The proposition identifying the set of relevant properties in relation to a given normative system and a given universe of actions we can call (following Alchourrón/Bulygin 1971, 103) the *thesis of relevance* of that system and that universe of actions.[12] For the system represented in Table 2, the thesis of relevance identifies the following set of properties: $\{M, C\}$.

One way of understanding STC 222/1992 is as holding that the principle of equality requires the *UC* in relation to subrogation to be *less fine* than the one taken into account by the legislator in the Landlord and Tenant Act. Thus, although parliament may stipulate the normative solution it considers adequate for the fact of *more uxorio* cohabitation concerning the right of subrogation, what it cannot do (i. e., what it is incompetent to do, what is a constitutionally impossible world) is to make marriage a privileged property with respect to the right to subrogation.[13]

Therefore, the declaration of unconstitutionality of art. 58.1 of the former Landlord and Tenant Act must be understood as a declaration to the effect that the universe of cases *UC(M, C)* is too fine, and that this is excluded by the Constitution. The less fine universe of cases *UC(C)* must be used instead. However, since completeness is not inherited down from finer to less fine cases (moreover, a consistent and complete system in relation to some relevant *UC* is necessarily incomplete in relation to a less fine *UC*; cf. Alchourrón/Bulygin 1971, 104), there is a gap in *UC(C)*. Case $\neg C$ (cf. Diagram 3) seems to be regulated with the normative solution 'subrogation is prohibited' *(Phs)* since *M* is irrelevant in case $\neg C$, i. e., case $(M, \neg C)$ and case $(\neg M, \neg C)$ have the same normative solution. But case *C* now appears with a normative gap. *M* is relevant in relation to *C* after all, since its presence or absence determines whether or not subrogation is permitted in *UC(M, C)*. Therefore, in *UC(C)*, case *C* has no normative solution. That is why the Constitutional Court goes on to fill the gap, and sentence STC 222/1992 is a *law-creating* sentence: it correlates the normative solution 'subrogation is permitted' with the case of a deceased lessee and his or her *de facto* partner having cohabited *more uxorio*.[14]

Thus, the constitution determines not only that certain normative solutions are excluded; it also stipulates that certain universes of cases (of a certain fineness) are excluded.

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[12] It should be clear that the meaning of 'relevance' in this chapter has nothing to do with the concept analyzed in Chapter I.

[13] Legal Foundation No. 6 says it in the following words: „The measure is so radical as to impair unreasonably the autonomy of the will of a man and woman who decide to cohabit 'more uxorio'." In fact, the new Landlord and Tenant Act of 1994 (in its art. 16.1) concedes the right of subrogation in case of the lessee's death to the spouse that cohabited with the tenant as well as to „the person that has permanently cohabited with the tenant in a relationship analogous to that of a spouse ...".

[14] In Italian constitutional doctrine, this kind of sentences is called 'sentenze additive'. Cf. Guastini 1993, 313. For a similar idea in the context of an analysis of this type of constitutional cases, cf. Guastini 1995, 157-176, and Parodi 1996.

On the other hand, not only can the universes of cases constructed by the legislator be too fine, i. e., can the legislator have made too many distinctions; the universes of cases constructed by legislators can also be not fine enough: the legislator can have made too few distinctions. In order to analyze this new case, we must introduce still another sense in which one can say that a property is *relevant*. We can distinguish the *descriptive* sense of relevance from its *prescriptive* sense (Alchourrón/Bulygin 1971, 103-106). To say that a property is relevant in the descriptive sense is to say that a certain state of affairs exists, that a certain case and its complementary have different normative status. To say that a property is relevant in the prescriptive sense is to say that a certain state of affairs *ought to* exist, that a case and its complementary *ought to* have different normative status.

Just as the proposition identifying the set of relevant properties in relation to a universe of actions was called the *thesis of relevance*, we can call the proposition identifying the set of properties that *ought to be* relevant for a universe of actions the *hypothesis of relevance* (Alchourrón/Bulygin 1971, 103). Since we know that completeness is inherited from finer to less fine universes of cases, if a relevant universe of properties is complete then all universes finer than this will also be complete. However, jurists also speak of gaps when the legislator has not taken into acount some property that *should be* relevant according to some hypothesis of relevance, i. e., when they think that a given solution is inadequate because it has not taken into account a distinction that should have been taken into account.

It should be noted that the hypothesis of relevance presupposes that one adopt some *axiological* criterion for establishing the relevance of certain properties. Here, I will not go into the question of whether such criteria are subjective or objective; in any case, constitutions usually postulate certain values from which one can extract criteria which make some theses of relevance used by the legislator inadequate.

In my view, this is the case in the Spanish Constitution (cf. Peces-Barba 1984, 1993) with the value of personal dignity (art. 10), the free development of the individual (art. 10), and the prohibition of inhuman and humiliating treatment (art. 15), in relation to the regulation the Criminal Code in force until May 15, 1996 gave to cases of euthanasia in its art. 411. For that Criminal Code, the victim's consent given in the case of a terminal illness or severe permanent and unbearable suffering was irrelevant. Moreover, so-called assistance in the execution of suicide was punished with the same sanction as murder, which means that in cases of the killing of another person consent was always irrelevant.

Now, one could say that our constitutional values require the legislator in those cases to take consent into account.[15] If that requirement were accepted, then the *UC* of the old criminal code would not be fine enough in relation to the universe of discourse of causing another person's death. The Constitution would require a finer *UC*, like that

[15] In fact, the new Criminal Code (Act 10/1995) punishes assistance in the execution of suicide with a lesser sentence (from six to ten years, art. 143.3) than murder (from ten to twenty years, arts. 138 and 139), and with a still lesser one (one or two degrees less than that of art 143.3; art. 143.4) someone „who causes ... the death of another upon that person's serious and unequivocal explicit request, in case the victim suffers of a severe illness that would inevitably lead to death or that produces permanent and unbearable severe pain ...".

of the Criminal Code recently enacted (cf. previous note). Had the Constitutional Court had the opportunity to rule on that question, and had it adopted the preceding reasoning, then it would have encountered a case of a legislative thesis of relevance that was not fine enough. Using a constitutionally adequate hypothesis of relevance, it would have had to go on to *create* law, giving a new normative solution (moderating or eliminating the punishment) to the case of euthanasia.

Although the legislator of the old criminal code regulated the case of euthanasia, from the constitutional point of view it regulated it inadequately. Therefore, here we do not face a case similar to that of the previous example, where we had a normative gap for the less fine, but constitutionally adequate *UC*; instead, the *UC* that is finer than the one used by the legislator does have a solution for the case, but that is an inadequate solution.

In that case, Alchourrón and Bulygin (1971, 106-110) speak of an *axiological gap*, which they define as follows:

„A case C_i of a Universe of cases UC_j is an *axiological gap* of the normative system α in relation to a UA_k = Df. the case C_i is correlated by α with a maximal solution of the *US*max (corresponding to UA_k) and there is a property p such that p *ought* to be relevant for C_i (according to a certain hypothesis of relevance) and p is irrelevant for α in relation to UA_k."

That means that a universe of cases UC_i can be constitutionally inadequate because it is generated by a thesis of relevance that is too fine, or because it is generated by a thesis of relevance that is not fine enough. In the first case, there is a *normative gap* in the *UC* that is less fine than UC_i, but constitutionally adequate. In the second case, there is an *axiological gap* in the *UC* that is finer than , but constitutionally adequate.

These two situations correspond to those described by Alchourrón and Bulygin (1971, 109) as situations in which the thesis of relevance and the hypothesis of relevance are different, but comparable:

„Situation I

The set of properties identified by the thesis of relevance is properly included in that of the hypothesis of relevance. This means that there is at least one property such that it ought to be relevant but is not relevant for the system in question. It also implies that the Universe of Cases corresponding to the hypothesis of relevance ... is finer than the *UCR*.
In this situation there is at least one case of axiological gap."

This, we have seen in the euthanasia example examined above.

„Situation II

The set of properties identified by the hypothesis of relevance is included in that of the thesis. This means that there is at least one relevant property which ought not to be so and that the *UCR* is finer than the [*UC* corresponding to the hypothesis of relevance]. Here the legislator has made too many distinctions. The consequence is that there are some solutions which are unjust (according to the hypothesis of relevance), but there are no axiological gaps."

That was the case in the example of the right of subrogation in the Landlord and Tenant Act.

Thus, we see that the constitution determines the width of the universes of cases the legislator can generate. For certain normative solutions, the constitution determines certain hypotheses of relevance. If the theses of relevance used by the legislator differ from the constitutionally adequate hypotheses, the legislator gives rise to constitutionally impossible worlds.

The proposition identifying the set of properties that *are* constitutionally relevant in relation to some legal system *LS* for a given universe of actions UA_i or, what amounts to the same, the proposition identifying the set of properties that *ought to be* relevant for the legislator in relation to that *LS* for that UA_i I will call the *thesis of constitutional accessibility* of the *LS* for the UA_i.

Satisfaction of the thesis of constitutional accessibility, however, is only a *necessary condition* of the constitutional adequacy of a legal system. A legal system may satisfy the thesis of constitutional accessibility and still be constitutionally impossible, since even if all the properties that ought to be relevant really are relevant, it may not correlate all cases with the constitutionally required solutions (as was the case with the death penalty mentioned in the previous section). In that case, the resulting world is constitutionally impossible because there is a normative antinomy between the normative solutions foreseen by the constitution and the normative solutions stipulated by the subconstitutional legislator.

Alchourrón and Bulygin (1971, 106) generalize the two cases as follows:

„We may generalize these observations saying: a normative system may be regarded as axiologically inadequate (bad or unjust) for a *UA* for two different reasons: (1) because it does not satisfy the hypothesis of relevance (what is wrong then is the selection of the cases); (2) because it fails to correlate the cases with the right solution (what is wrong then is the solution given to the cases which have been selected correctly). As is obvious, these two defects are not incompatible: a system may solve wrongly cases wrongly selected."

Adapting these considerations to the relationships between the constitution and subconstitutional legislation, we can say that a normative system can be constitutionally inadequate in relation to a given *UA* for two reasons: 1) because it is not in accordance with the thesis of constitutional accessibility; and 2) because the normative solutions it assigns to certain cases are inconsistent with the solutions determined by the constitution.

Therefore, we can say:

A world is *constitutionally impossible* in relation to some *UA* of that world if and only if: 1) either its relevant universe of cases does not accord with the thesis of constitutional accessibility; or 2) some of its normative solutions are inconsistent with the solutions foreseen in the constitution.

4. Conclusions

(1) The constitution, i. e., the originating system of a legal order, determines a set of sequences of legal systems. It thus divides the possible legal systems into two sets: constitutionally possible legal systems, and constitutionally impossible or excluded legal systems.

(2) A contextual explication of that special primacy of the originating system can be found, for constitutional democracies, in precommitment as a mechanism of collective rationality. The authority creating the constitution 'binds the hands' of subsequent authorities. The constitutional authority is like a sober person binding the future decisions of that same person when she is drunk (Holmes 1988, 197).

(3) It should be noted that legal worlds following the original constitution can not only be excluded for stipulating normative solutions for some cases that are inconsistent with the originating system, but also for choosing cases in an inadequate way, i. e., for not satisfying what I have called the thesis of constitutional accessibility.

V. CONSTITUTIONAL INTERPRETATION

1. Introduction

In the previous four chapters, I have attempted to present a view of the law according to which the constitution plays a decisive role in the determination of the truth-value of legal propositions. In particular, it may be the case that the norm expressed by a provision issued by a subconstitutional authority, and which stipulates that certain persons have certain rights or obligations, does not belong to any of the legal systems of that legal order, because, e. g., it has been issued by an incompetent authority. Thus, norms that have been enacted but whose origin cannot be traced back to other norms do not belong to any of the systems of the respective legal order. In addition to this, constitutions also determine a range of matters for which subconstitutional authorities are definitively incompetent: these are all matters regulated in a way that is inconsistent with the constitution, as well as those that do not fit to what I have earlier called the thesis of constitutional accessibility.

But, how is one to determine the meaning of constitutional provisions? In fact, the extensional identification of independent norms is not an easy task. Usually, there is widespread agreement about the text that contains those norms, although sometimes even the identification of the text is questioned in some aspect or other. Sometimes there are several texts with slight differences that may create problems for the determination of the *authentic* text.[1] Here, I will not go into these questions concerning what (following Moore 1989, 115) we can call the *syntactic constitution*, that is, the constitution understood as a set of uninterpreted linguistic symbols.[2] What interests me, instead, is the question of the meaning of those texts; and since throughout this book I have subscribed to a position according to which norms are abstract entities, what I am interested in is to determine what the *norms* of the constitution are, i. e., the question of the *semantic constitution* as a set of meanings. Only by considering the meaning of the constitutional text, the idea of the primacy of the constitution can be understood. This primacy is of a semantic nature, because it would be rather strange to say that a text of uninterpreted symbols has such primacy; the idea of syntactic primacy is unintelligible.[3]

Thus, the question of constitutional interpretation, of conferring a certain meaning to certain constitutional texts, can be approached from the point of view of asking

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[1] For two interesting contributions to such problems with texts cf. Amar (1987) concerning the Constitution of the United States, and Vallejo (1993-1994) concerning the Spanish Constitution of 1869.

[2] In Spain, Hernández Marín (1984, 11 ff., 1989, 49 f.; cf. also Braybrooke 1989, 289) has defended a radically inscriptionist conception of legal norms, based on a nominalist philosophy of language. But even if one concedes that legal norms are nothing but texts — token-sentences — what matters is how they should be interpreted. Unfortunately, whatever the result of that controversy about the ontology of language, there will still be the more important question of how to construct a theory of constitutional interpretation.

[3] One could say that meta-languages have syntactic priority over their object-languages. But in order to distinguish between language and meta-language, we need a minimum of interpretive activity which renders even that weak priority questionable.

about the truth-conditions of a special kind of legal propositions which I will call *constitutional propositions*. These are propositions expressed in sentences like:

(CS) Constitutionally, *F*s ought to (must not, may) do *Y*.

Everything said in Chapter II about legal propositions applies here too. Now, in that chapter, I had assumed that the existence of norms guaranteed the truth or falsehood of propositions expressed by sentences like *(CS)*. Moreover, when there are no such norms, it was said, such propositions have no truth-value. Now, in contrast, we must ask how certain normative texts are correlated with a certain meaning, since it is in relation with the meaning of normative texts that we can establish the truth-conditions of constitutional propositions.

Sentences like *(CS)* can be analyzed as

(CS_1) The normative consequences of the constitution contain a norm which stipulates: 'Constitutionally, *F*s ought to (must not, may) do *Y*'.

The truth-conditions of that statement depend on the attribution of meaning to certain constitutional texts. They depend on the truth of interpretive statements like

(IS) Constitutional text *T* means ...

But how does one attribute meaning to a constitutional text? That is a general question of legal philosophy which as such is, I think, of theoretical interest. But it is also of great practical interest, since many contemporary legal systems have courts whose function it is precisely to decide whether or not certain provisions issued by subconstitutional authorities (mainly, the legislative power) are in accord with the constitution. Obviously, in order to fulfil this function the constitutional texts must necessarily be given a meaning. In view of the importance of the questions treated by such courts, theories of constitutional interpretation are usually seen to have great political relevance. One of the questions to be explored in this chapter is to what extent a theory of constitutional interpretation can be independent of political considerations.

Theories of constitutional interpretation do, in fact, presuppose some theory about the nature of the law. Thus, they make it necessary to go back to some of the considerations presented at the beginning of Chapter II. A *realist* conception of the law will lead to another theory of constitutional interpretation than a *constructivist* conception. Besides, we must distinguish a particularly radical form of constructivism, according to which constitutional propositions referring to generic cases never have a truth-value. According to this position, which I will call *skepticism*, there is no way in which we could give unequivocal meaning to constitutional texts, and the constitution is nothing but what the courts say that it is.

In an illuminating article, Hart (1983a) describes the theory of law in the United States as being situated between two extremes that can be understood as a version of realism and a version of skepticism, respectively.

In Hart's own words:

„I have portrayed American jusrisprudence as beset by two extremes, the Nightmare and the Noble Dream: the view that judges always make and never find the law they impose on litigants, and the opposed view that they never make it. Like any other nightmare and any other dream, these two are, in my view, illusions, though they have much of value to teach the jurist in his waking hours. The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other. It is not of course a matter of indifference but of very great importance which they do and when and how they do it. That is a topic for another occasion." (Hart 1983a, 144)

Following Hart, I will call the conception that takes a realist metaphysical stand towards the interpretation of the constitution the 'Noble Dream'. This will enable me sometimes to avoid the word 'realism' which is so confusing in this context because what is known as '(American) legal realism' is, from the point of view adopted here, a skeptical position. The skeptical conception of constitutional interpretation, I will call the 'Nightmare'. The intermediate position, a kind of moderate constructivism which I will try to defend, can then be called the 'Vigil'.

To each of these positions, we can, thus, ascribe four theses about the status of constitutional propositions. These theses will later help me to structure the discussion.

The theses of the *Noble Dream* are the following:

(1) *Metaphysical* thesis: Independently of our knowledge, there is a legal world which makes our constitutional propositions true or false.
(2) *Semantic* thesis: The meaning expressed by constitutional statements is determined by their truth conditions, independently of how we may be able to verify them.
(3) *Logical* thesis: The principle of bivalence is accepted. All constitutional propositions are either true or false.
(4) *Legal* thesis: There always is exactly one right answer in constitutional cases. Courts always apply and never create law. Therefore, courts can err in establishing the constitutional rights and duties of citizens.

The theses that can be ascribed to the conception of the *Nightmare* are:

(1a) *Metaphysical* thesis: Beyond our capacity for knowing the law, as constructed by human beings, there is no legal world that could make our constitutional propositions true or false.
(2a) *Semantic* thesis: One cannot ascribe meaning to pure constitutional statements (i. e., statements the truth of which depends exclusively on the existence of certain constitutional norms), because it is impossible to give meaning to the norm-formulations in a constitution.
(3a) *Logical* thesis: Pure constitutional propositions have no truth-value since they refer to the alleged existence of the meanings given to constitutional norm formulations, and there are no such meanings (norms).
(4a) *Legal* thesis: There never is a right answer in constitutional cases. Courts always create and never apply law. Therefore, courts cannot err in establishing the constitutional rights and duties of citizens.

Finally, the theses that can be ascribed to the *Vigil* are:

> (1b) *Metaphysical* thesis: Beyond our capacity for knowing the law, as constructed by human beings, there is no legal world that could make constitutional propositions true or false.
> (2b) *Semantic* thesis: The meaning of pure constitutional statements is determined by their conditions of assertability, that is by the possibility to show that certain consequences follow from the original legal system, i. e. from the constitution.
> (3b) *Logical* thesis: Not all constitutional propositions are true or false.
> (4b) *Legal* thesis: Sometimes there is a right answer in a constitutional case, and sometimes there isn't. On some occasions, courts create law, on others they apply it. Therefore, in those cases where they apply previously existing law, courts can err in establishing the constitutional rights and duties of citizens.

In hard cases, the controversy between those three conceptions becomes very important. For *Noble Dream* conceptions, cases can only be hard for epistemic reasons; under ideal epistemic circumstances, we would find solutions for all constitutional hard cases. For *Nightmare* conceptions, in contrast, all cases are hard cases. And for the *Vigil*, even under ideal epistemic circumstances there can be hard cases, though not all cases are hard.

Obviously, there are several ways of defending each one of those positions. The later sections of this chapter will try precisely to present and discuss some of the ways in which those conceptions are expressed. What I have called the legal thesis — in its forms of (4), (4a), and (4b) — will help us distinguish between different conceptions, since not all the conceptions I will present endorse the four theses just presented. In fact, in what follows, one of my topics will be the conceptual relationship between those theses. That relationship is one of the central questions in the philosophical controversy between realism and antirealism, of which the legal debate is only one of several battlefields (Wright 1992b, 2).

2. The Noble Dream

The conceptions I include in this section hold that all constitutional cases, even the most difficult and controversial ones, have a unique right answer and that, therefore, in all cases presented to them, the courts have a unique applicable solution. Sometimes these conceptions have been known as *formalist*.[4] The conceptions presented here, however, are restatements of the thesis of the right answer taken from the more recent literature. More precisely, I will look at an especially robust form of *metaphysical realism*, linked to the natural-law tradition, which has recently been defended by M. Moore (1981, 1982, 1985, 1987, 1989, 1992a, 1992b), as well as by O. Brink (1988) and H. Hurd (1990). I will also take up the conception of legal interpretation held by R. Dworkin

[4] Or as *Begriffsjurisprudenz*, or *mechanical jurisprudence*, etc. Cf. Jhering 1854, Pound 1908. Interesting presentations of formalism can be found in Bobbio 1965, Schauer 1988.

(1977c, 1985, 1986, 1991), certainly the most distinguished advocate of the thesis of the one right answer. Again, I would like to underscore that what these conceptions have in common is their acceptance of thesis (4), whereas theses (1), (2) and (3) can be ascribed to the *Noble Dream* only for an idealized version which, as we will see, may fit only to metaphysical realism.

a) The Noble Dream of metaphysical realism

Wright (1992b, 1 f.) recently characterized philosophical realism as a combination of modesty and presumption. Taking as an example the case of the philosophical position about the existence of an external world, modesty would be expressed in the notion of that external world's independence from us, i. e., from the conceptual scheme with which we think about it. Human thinking is, in Frege's words, only a map of the world, and the world does not in the least depend on the cartographical techniques used in representing it. What is presumptious, in contrast, is the thought that we are able to conceive of the world in an adequate way and to know the truth about it, although whether or not our thinking fits to the world is determined independently of human cognitive activities.

Perhaps it is precisely this combination of modesty and presumption that makes philosophical realism attractive. Now, as Wright himself has recognized, the extent of that modesty depends on the propositions we refer to. To think that there are mathematical entities that render our mathematical propositions true or false is less modest than to think that there are ordinary objects (like tables and chairs) that make our propositions about the ordinary world true or false. Similarly, modesty is weaker in the case of legal propositions: To think that there are legal duties and rights in the world that make our legal propositions true or false is not precisely a very modest philosophical position.

Thus, not all realisms are equally plausible. Realism in mathematics, ethics, aesthetics, literary criticism, or law is a philosophical position that is more presumptious than modest. However, several philosophers recently constructed a realist theory for legal propositions that is worth to be analyzed.

Moore is probably the clearest supporter of philosophical realism as applied to legal propositions and, more specifically, to the question of the interpretation of the law. In his words (1985, 397), „our interpretive practices reveal us to be both metaphysical realists and (as a special case of that) natural lawyers". The following quote gives a good idea of his position:

„I call the thory of interpretation I wish to defend a natural law theory of interpretation because of two propositions that characterize it: 1) that there is a right answer to moral questions, a moral reality if you like; and 2) that the interpretive premises necessary to decide any case can and should be derived in part by recourse to the dictates of that moral reality. In short, real morals, not just conventional morality or 'shared values', have a necessary place in the interpretation of any legal text." (Moore 1985, 286)

Moore (1985, 283 f.) regards the theory of legal interpretation as part of a more general theory of legal reasoning. In his view, the theory of legal reasoning has four parts: *(i)* a theory about the nature of law that enables us to identify the set of authoritative statements that belong to the law, i. e. a *rule of recognition*, *(ii)* a theory about facts that en-

ables us to determine which of the innumerable descriptions of the facts of a case should be used, i. e. that enables us to determine which is the relevant *universe of cases* (in the sense explained in Chapter IV), *(iii)* a theory of interpretation that enables judges to establish the interpretive premises which connect the facts of a case with the norms of the law, and *(iv)* a theory about logic and its place in legal reasoning.

Although, obviously, the parts are related, we can adopt Moore's classification and turn to the theory of interpretation.

According to Moore, a theory of interpretation presupposes a theory of the meaning of linguistic expressions in natural language, and such a theory is part of a broader theory of communication. Theories of meaning, in turn, can be divided into *conventionalist* and *realist* theories (1985, 291-301). Conventionalist theories see the relations between symbols and things as essentially arbitrary, as a mere matter of convention. Realist theories, in contrast, hold that the meaning of words is not determined by convention. Realist theories usually (Moore 1985, 321-328, Brink 1988, 116-119) rely on the so-called *causal theory of reference* defended in contemporary philosophy of language by Kripke (1971, 1980) and Putnam (1973, 1975).

According to that *causal theory of reference*, the referents of proper names (e. g., 'Aristotle', 'Kelsen') as well as of certain predicates (such as 'water', 'gold') determine their meanings. For Kripke, proper names are rigid designators, they name the same individual object in all possible worlds: and according to Putnam, predicates like 'water' also are *rigid designators*, since their referent is what determines their meaning. Such rigid designators are regarded as the result of a kind of „baptizing act" („naming ceremony" or „act of introduction"; Putnam 1975; cf. also Evans 1982, 121 ff.) that is accepted by some linguistic community and carried out in reference to certain objects of our experience. We may be ignorant or mistaken about the true nature of the properties of the object referred to (perhaps Aristotle wasn't the teacher of Alexander the Great or the student of Plato ..., or Kelsen was not born in Prague, or was not a member of the first Austrian Constitutional Court; perhaps the term 'water', when it was first used, was erroneously associated with some mysterious structures other than H_2O ...), but the „baptizing act" has fixed the referent of the object once and for all, with complete independence of our corresponding beliefs (a linguistic division of labor is the idea with which Putnam explains that the beliefs of some members of a community may be mistaken).

Putnam (1975, 215-219) sees the causal theory of reference as a critique of two commonly accepted theses of the theory of meaning: *a)* that to know the meaning of a term consists in being in a certain state of mind („meanings are in the head"), and *b)* that the meaning, in the sense of the intension of a term, determines its extension. With the causal theory, we can sustain, on the contrary, that it is the extension that determines the intension of a term, and that meaning therefore does not correspond to any state of mind at all.

Moore holds an unconventional theory of meaning according to which „to find the meaning of all such words is, accordingly, not a matter of finding some antecedently stipulated convention, the task is the more creative one of discovering how the world is constituted" (Moore 1985, 338). Moore distinguishes between *nominal* kinds (derived

by convention) and *natural* kinds (whose classification corresponds to the structure of the world).[5] Many terms that appear in legal texts must therefore be interpreted according to the *realist* theory of meaning. Moore gives the example of the word 'death' and, regardless of whether there is some legislative definition of it, holds:

„The meaning of words like 'death', therefore, is not to be found in some set of conventions; meaning is neither a set of standard examples, nor a set of properties conventionally assigned to a symbol. The meaning of a word like 'death' is only to be found in the best scientific theory we can muster about the true nature of that kind of event. By assuming that there are such true natures of natural kinds of things, the theory of meaning presupposed by our usage is aptly termed a *realist* theory of meaning." (Moore 1985, 300)

Moore, who is also an advocate of moral realism (1982, 1992b), sustains that there are moral kinds (1985, 333-338). Thus, terms — sometimes known as *evaluative* terms — which appear in legal texts, as, for instance, the expression 'inhuman or humiliating punishment or treatment' in art. 15 of the Spanish Constitution of 1978, refer to the moral kinds of the inhuman and the humiliating which await „discovery" in real life. Thus, what kind of punishment or treatment the Spanish Constitution prohibits is a question that does not depend on an evaluation or convention (nor on the intentions of the founders of the Constitution, nor on social speech habits), but on certain characteristics of the world, independently of human beings.

Now, the question here is not to go into a discussion of the plausibility of moral realism,[6] although later I will have to say something about the relevance of that thesis for the question we are interested in. Here, I will concentrate exclusively on how the position of Moore or Brink deals with the four theses I attributed to the *Noble Dream*.

First, the metaphysical thesis according to which there is a legal world which, independently of our knowledge about it, can render our constitutional propositions true or false. According to metaphysical realism, whether or not a treatment is inhuman or humiliating does not depend on us (or our beliefs or attitudes), but on how the world is. Thus, Brink (1988, 120 f.) writes that 'just' or 'cruel' denote natural moral kinds, just as 'toxic' denotes a natural chemical kind. We may be wrong about whether or not certain behaviours are humiliating, but if we had adequate knowledge about the relevant facts we would have reasons for changing our judgment.[7]

In the case of the law, the realism such a position must endorse is especially robust. It must assume that for each legal system there is a corresponding, *completely determined* possible world that can give each action a single deontic qualification.

Hurd (1990) has taken a step to strengthen this position — perhaps for the price of making it implausible. According to Hurd, legal norms should not be understood, as

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[5] In a recent article, Moore (1992a) has distinguished those kinds from the kinds now called functional (predicates referring to artificial objects created by man). Putnam (1975, 242-244) had extended his conception in order to include the names of artefacts created by human beings in his theory.

[6] See the critique of moral realism in Mackie 1977a and Harman 1977 and the recent defence in Brink 1989 and Smith 1994.

[7] Moore (1985, 312) defends a kind of coherentist epistemology for the justification of particular judgments. To him, such a theory seems compatible with a realist theory of truth (truth as correspondence).

would be the case in a communicative model of law, as prescriptions that guide our conduct, but as descriptive statements about what he calls „optimal legal arrangements". Therefore,

„the legislature has authority for us only if it functions as a heuristic guide to antecedently existing moral facts. To the extent that the legislature mistakenly decides or distorts the optimal state of affairs or its attendant obligations, the legislature will fail to have (theoretical) authority for us" (Hurd 1990, 1010).

On this view, there is a world of optimal legal arrangements independently of what legal norms stipulate. And legal norms are true or false, depending on whether or not they describe this world. This is a formulation of the metaphysical thesis in its pure state, so to speak.

In this way, the semantic thesis of metaphysical realism, according to which the meanings expressed in constitutional statements are determined by their truth conditions, independently of how we may be able to verify them, also is established. As Moore (1987, 455) says, „what is distinctive about realism is the belief that propositions can be true even if we, at present, have no rational grounds for believing or asserting that they are true". The metaphysical thesis does in fact imply this semantic thesis. If there is a world of optimal legal arrangements independently of what legal norms stipulate, then the propositions referring to legal duties and rights are true or false, depending on whether or not they correspond to that world. As I have formulated it, the semantic thesis also implies the metaphysical thesis.

The logical thesis, i. e., the acceptance of bivalence, is implied by the metaphysical and the semantic thesis. We may have doubts about whether or not force-feeding prisoners who are conducting a hunger strike for the improvement of the living conditions in prison constitutes an inhuman or humiliating treatment.[8] But the corresponding constitutional proposition is either true or false, since „The realist justifies his bivalent semantics by sharing the language-users' faith that there is an underlying reality out there whose 'hidden nature' is determinative of truth-values one way or the other in cases we presently cannot resolve" (Moore 1987, 485).

According to Moore (1987, 506), the thesis of the one right answer can only be grounded in moral realism and in a natural-law theory of legal reasoning. Moore thus thinks that an institution like constitutional review is justified because the courts with the competence to review the constitutionality of other provisions only apply the law (the constitution) that stipulates rights and obligations which already exist, independently of the rulings of those courts. Thus, Moore says (1985, 395): „The justification for judicial review is simply that people really have rights, and no consensus of the majority, even when embodied in a statute, should be allowed to trample on them. A realist can concede the antidemocratic nature of judicial review because he can justify it with higher values." Therefore, it is obvious that courts may be mistaken in stipulating certain rights and duties of citizens, just as our descriptive judgments about the world may be wrong.

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[8] Cf. the rulings of the Spanish Constitutional Court of June 27, 1990 and July 19, 1990 as well as Atienza 1993, chap. 4.

Those theses constitute a forceful defence of metaphysical realism as applied to constitutional propositions, and, as we saw at the beginning, according to Moore they give meaning to the interpretive practices of our lawyers and courts. Such a robust form of metaphysical realism, however, requires a careful evaluation which I will present at the end of this section. But first I will look at a more modest way of defending the thesis of the one right answer, namely, the theory of Ronald Dworkin.

b) Dworkin: 'The Noblest Dreamer'[9]

In contemporary legal theory, the thesis of the one right answer is closely associated with Dworkin's legal theory. It is a sophisticated, complex theory that has developed over the years.[10] But for the present purpose, I will concentrate on his defence of the thesis of the one right answer, as it can be found in Dworkin 1985.[11]

Dworkin considers a version of legal positivism which he criticizes in all his works, using an analogy to a certain exercise of literary criticism. Dworkin invites us to assume that some Dickens scholars go about analyzing *David Copperfield* as if David were a real person. They want to assert certain propositions about David as true: that he attended Salem House, that he was an industrious student, etc. Dworkin suggests that these propositions are governed by the following rules (1985, 134):

„(1) Any proposition about David may be asserted as 'true' if Dickens said it, or said something else such that it would have been inconsistent had Dickens denied it."

„(2) Any proposition about David may be denied as 'false' if Dickens denied it, or said something else such that it would have been inconsistent had Dickens said it."

These rules do in fact stipulate truth-conditions for propositions about David similar to those formulated above, in Chapter II, for legal propositions. They amount to saying that a proposition about David is true if it describes a sentence that *belongs* to Dickens's novel, or if it describes sentences that are the logical consequence of propositions that belong to that novel; and that a proposition about David is false if it describes a sentence whose negation *belongs* to Dickens's novel, or if it describes sentences whose negations are logical consequences of propositions that belong to that novel. That means that the truth-values of propositions about David *presuppose* the (explicit or implicit) existence of certain sentences in the novel.[12] Now, what happens if the novel does not

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[9] As Hart says (1983, 137): „He [Dworkin] is, if he and Shakespeare will allow me to say so, the noblest Dreamer of them all, with a wider and more expert philosophical base than his predecessors, and he concentrates formidable powers of argument on defence of his theory."

[10] For this evolution, cf. Raz 1986a.

[11] This is a revision of Dworkin 1977b.

[12] As we will see, Dworkin thinks these rules are insufficient. But in a certain sense, they are excessive: according to them, many irrelevant consequences will be true. Let's assume the proposition expressed in the sentence 'David attended Salem House or visited Barcelona'. Since the negation of that proposition is inconsistent with something Dickens said — namely, that David did attend Salem House —, according to rule (1) it is true. Here too, the notion of relevant logical consequence, introduced in Chapter I, is useful to re-

say anything, neither explicitly nor implicitly, about some fact about David, e. g., that David had a homosexual relationship with Steerforth?'According to the rules proposed by Dworkin, such propositions would have no truth-value, since because of (1) they are not true, but because of (2), they are not false either.

According to Dworkin, this exercise in literary criticism suggests a special kind of legal positivism, according to which a legal proposition is true if some authority has, explicitly or implicitly, issued a norm of a certain kind, and it is false if some authority has issued, explicitly or implicitly, a norm in the opposite sense. If none of the two things has taken place, then the proposition would have no truth-value.

Dworkin adds (1985, 135) that this kind of legal positivism must be distinguished from another kind which holds that if there is no legal norm to determine the validity or invalidity of, e. g., a contract, then the proposition according to which that contract is legally valid as well as the proposition according to which it is invalid are both false. In our literary exercise, this would be equivalent to saying that 'According to Dickens's novel, David had a homosexual relationship with Steerforth' is just as false as saying that 'According to Dickens's novel, David did not have a homosexual relationship with Steerforth'. As the analysis of the controversy between Russell and Strawson about predicative statements — treated in Chapter II — has shown, the two reconstructions are equivalent. One only needs to distinguish — as I did in Chapter II — two concepts of falsehood. One is the sense of falsehood reconstructed by Dworkin's rule (2); on this notion of falsehood, the proposition referring to David's relationship with Steerforth is neither true nor false. According to another notion of falsehood, however, a proposition referring to David is false if it is not one of the propositions that can be shown to belong to Dickens's novel. In this second sense, the propositions referring to the relationship between David and Steerforth are false. The advantages of distinguishing between falsehood and non-truth are by now well-known, and I will not go into them here.

For the conception of law underlying this analogy, there are cases that have no right answer. Dworkin thinks, however, that neither in literary criticism nor in law there is any reason to assume such a meagre set of rules. According to Dworkin, a more adequate way of literary practice would be one where „a further proposition about David is assertable as true (or deniable as false) if that further proposition provides a better (or worse) fit than its negation with propositions already established, because it explains in a more satisfactory way why David was what he was, or said what he said, or did what he did, according to those already established propositions" (Dworkin 1985, 136). Analogously, he prefers a reconstruction of legal practice similar to that which arises from those new rules of literary criticism. He (1985b, 137) thinks that the most influential argument in favour of the thesis against the right answer is the one he calls the *thesis of demonstrability*. It holds that if the truth of a proposition cannot be shown even if all the relevant 'hard facts' (i. e., physical facts and facts about the behaviour of people, including their thoughts and attitudes) are known or stipulated, then it cannot be true. Dworkin does not think that there are good reasons for the thesis of demonstrability. He

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strict the exercise of literary criticism to those propositions stated by Dickens, and their *relevant* logical consequences.

suggests the possibility of an extention of our ontological baggage, and he adds that if moral facts existed, then the thesis of demonstrability would be false. If the fact that a certain behaviour (like force-feeding prisoners on a hunger strike) is humiliating would depend on the existence of certain moral facts, then the corresponding legal proposition could be true even if, for some reason, we would not know it. Dworkin adds that though he will not try to make the existence of moral facts plausible, he will maintain the existence of some kind of facts beyond hard facts. Returning to the literary analogy, he believes that the best form of literary practice is the one that postulates the existence of certain facts of narrative consistency. Such facts do not presuppose that David is a real person, but they offer arguments that enable us to look at the novel in its best reconstruction. The existence of that kind of facts, according to Dworkin, is given as internal to literary practice, and it is immune against any skeptical attack, because it does not assume that there is any metaphysical literary world outside of the practice to which we can turn in order to find out whether or not David did have a homosexual relationship with Steerforth. The question is answered using the technique of considering whether the truth of that proposition would allow us to understand the novel any better. There may, of course, be unanswerable questions, but Dworkin thinks that that is very rarely the case.

Dworkin invites us to carry that literary practice over to our theory of legal propositions. A legal proposition would thus be true if it formed part of the best justification that can be given of the legal system in question. In view of the legal material at hand, such a justification must be given along the lines of two dimensions: the *dimension of fit* and the *dimension of political morality*.[13]

The dimension of fit is related to the idea that a political theory is a best justification of existing legal material if it accounts for the legislative and jurisdictional history of some legal order better than other theories. It may happen that several theories offer different justifications that adequately fit the legal material; in that case, the dimension of political morality is decisive for the best justification: it is that political or moral theory that comes closest to including the rights people *de facto* possess. In Dworkin's view, this means that practically in all cases precisely one right answer will emerge from the filter of the two dimensions.

These two dimensions obviously constitute a particular conception of the nature of law which Dworkin has been constructing on the basis of his critique of Hart's legal positivism. I will only mention a few steps in the course of this construction:

(i) the law is not only a set of rules, but also of principles of political morality that cannot be identified with the help of the rule of recognition (Dworkin 1977c, ch. 2);

(ii) the law is of an interpretive nature — the only nature that can adequately explain the existence of disagreements among jurists (Dworkin 1986, chap. 2); for instance, when jurists disagree about whether or not a certain treatment is humiliating, that disagreement is not about the linguistic conventions underlying the meaning of 'hu-

[13] Cf. Dworkin 1977c, ch. 4. The importance of those two dimensions has been reaffirmed, while the theory has been developed further in Dworkin 1986.

miliating treatment', but about the different *conceptions* given by different theories of the concept of humiliating treatment; and

(iii) the best reconstruction of this interpretive notion of law can be found neither in *conventionalism*, according to which judges discover and apply certain conventions of the past, nor in *pragmatism*, according to which judges must construct future law without being bound by conventions, but in the law *as integrity* which offers the best interpretation of our legal practice (Dworkin 1986, ch. 7).

None of these points, which constitute sharp and brilliant arguments, will be analyzed here. My purpose is more modest. It only consists in showing some of the grounds on which Dworkin's conception of law, that leaves no room for indeterminacies, is based.

From what has been said, it already follows that Dworkin defends the logical thesis — that of bivalence — and the legal thesis — that of the one right answer. As I said before, he is the most brilliant advocate of these theses. Now, it is interesting to note that Dworkin does not think it necessary to base them on a defence of the metaphysical and the semantic thesis. He thinks that the truth of the thesis of the right answer (i. e., of determinacy and objectivity in the law) is independent of the status of the metaphysical and the semantic thesis. This is shown by his position on skepticism.

Dworkin (1986, 76-85)[14] distinguishes two kinds of skepticism: external and internal skepticism. External skepticism is a thesis *about* legal practice as interpretive practice. On this conception, which is a metaphysical theory, moral values (like aesthetic ones) are not part of the *fabric of the universe*. When someone says that slavery is unjust, he is not stating something about reality, but projecting his own opinions on the world.[15] According to Dworkin, this kind of skepticism is no challenge to the objectivity of value judgments of any kind. Whatever the status of this metaphysical theory, the relevant skepticism is internal skepticism, according to which, in moral discussion, 'slavery is unjust' does not have better arguments on its side than 'slavery is just'. Dworkin holds this position to be untenable. In any interpretive practice (literary, moral, legal), participants are able to give arguments in favour of a position, and those arguments can be evaluated within the practice. Thus, internal skepticism is highly implausible.

It actually looks as if Dworkin's interpretive conception of the law is constructivist with respect to the existence of a legal world that is independent of our knowledge, and of a legal truth that is independent of our capacity to justify, under ideal epistemic conditions, the truth of our legal propositions.

Now, is it plausible to maintain this constructivist approach on the metaphysical and semantic level while holding the thesis of bivalence and the thesis of the one right answer, which I have attributed to metaphysical realism? The critique of Dworkin that I will present later will turn on the possibility of making the two conceptions compatible. Here, I want to point out that Dworkin's conception is perhaps compatible with the one

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[14] A recent reconsideration of these arguments, which will not be discussed here, can be found in Dworkin 1996a, 1996b.

[15] For a projectivist conception of moral judgments cf. Blackburn 1984, 197-202.